

1
2
3
4
5
UNITED STATES DISTRICT COURT
6
SOUTHERN DISTRICT OF CALIFORNIA
7
8

9 EXPRESS COMPANIES, INC., dba
10 AMERICAN EHS/AMERICAN CPR,
dba FIRST-AID-PRODUCT.COM,
AEDGRANT.COM,

CASE NO. 10cv178-WQH-WMC
ORDER

11 Plaintiff,

12 vs.

13 LIFEGUARD MEDICAL SOLUTIONS,
LLC, dba LIFEGUARDMED.COM,
AEDSUPPLYSTORE.COM,

14 Defendant.

15 HAYES, Judge:

16 The matter before the Court is the “Rule 12(b)(6) Motion to Dismiss and Rule 12(f)
17 Motion to Strike Plaintiff’s [First Amended] Complaint” (“Motion to Dismiss”). (Doc. # 17).

18 **I. Background**

19 On January 22, 2010, Plaintiff Express Companies, Inc., dba American EHS/American
20 CPR, dba First-Aid-Product.com, Aedgrant.com (“Express”), initiated this action by filing a
21 Complaint in this Court alleging a federal law claim for copyright infringement and thirteen
22 state law claims against Defendant Lifeguard Medical Solutions, LLC, dba Lifeguardmed.com,
23 Aedsupplystore.com (“Lifeguard”), Harvard Reynolds, Chet Frist and Shirley Cantrell. (Doc.
24 # 1).

25 On May 21, 2010, all defendants filed a motion to dismiss the Complaint for failure to
26 state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. # 3), and the three
27 individual defendants filed motions to dismiss for improper venue and lack of personal
28 jurisdiction (Doc. # 4, 5).

1 On June 11, 2010, Plaintiff filed a First Amended Complaint, which names Lifeguard
 2 as the sole Defendant. (Doc. # 11).

3 **A. Allegations of the First Amended Complaint**

4 “Plaintiff Express is a corporation ... engaged in the business of offering products and
 5 services including CPR training classes and other safety training classes; ... first aid products;
 6 ... [and] automatic external defibrillators (AEDs) including a grant program for qualifying
 7 entities....” *Id.* ¶ 9. “Defendant Lifeguard is a distributor of products and services including
 8 automatic external defibrillators (AEDs) and CPR Training Courses, and products related
 9 thereto.” *Id.* ¶ 17.

10 During “mid-2006” or thereafter, Plaintiff Express entered into an agreement with
 11 Defendant Lifeguard in which “Express would sell products provided by Lifeguard, who
 12 would then deliver the products directly to the purchaser. Many products were sold to Express
 13 customers without Medical Direction materials, and in such instances, Lifeguard was barred
 14 by agreement from providing any Lifeguard Medical Direction or marketing materials to the
 15 purchaser.” *Id.* ¶ 19. As part of the written agreement between the parties, Defendant
 16 Lifeguard executed a document entitled “Confidentiality of Proprietary Information” which
 17 stated in pertinent part:

18 Any attempt to compete with Express Companies, Inc. by conducting business
 19 directly with a Client, Instructors, vendors, affiliates, employees, subdistributors
 20 or assigns that were originally contacted through Express Companies, Inc., or
 21 has been identified as a current or previous Client, Instructor, vendor, affiliate,
 employee, sub-distributors or assign will not be permitted and will be subject to
 legal action. This is considered dishonest, unethical and unprofessional
 behavior and will not be tolerated.

22 *Id.* ¶ 20. In late-May 2008, Harvard Reynolds, a member, manager or principal of Defendant
 23 Lifeguard, “signed a document reasserting Lifeguard’s obligations under the ‘Confidentiality
 24 of Proprietary Information’ agreement.” *Id.* ¶ 21.

25 Since the 2006 agreement between the parties, Defendant “Lifeguard sent its marketing
 26 materials to as many as 600 of Express clients, interfering with Express’ opportunity to sell
 27 training courses to these parties.” *Id.* ¶ 24. “[A]s a result, many of Express’ clients engaged
 28 Lifeguard for CPR Training classes and related training classes rather than Express, ... in

1 contravention of Lifeguard's agreement with Express." *Id.* ¶ 25.

2 On July 2, 2009, Lifeguard filed suit against Express in Tennessee state court "for
3 recovery of \$50,009.88 claimed to be owed by Express to Lifeguard." *Id.* ¶ 27.

4 In August 2009, Express posted "advertisements for Prestan brand CPR manikins at its
5 ebay.com store 'americanmpr.'" *Id.* ¶ 29. The product descriptions in the advertisements
6 included "original text created by Express." *Id.* ¶ 30. "Shortly thereafter, Lifeguard posted
7 advertisements for the same and similar Prestan brand products as Express at Lifeguard's
8 ebay.com store 'aed-supply.' ... Lifeguard included in its ads Express' original text...." *Id.* ¶¶
9 31-32. "On October 14, 2009, Express filed the document 'Prestan Description for Ebay' for
10 copyright registration with the United States Copyright Office." *Id.* ¶ 34. "Lifeguard has, and
11 continues to infringe on Express' copyrighted work, and specifically the work 'Prestan
12 Description for Ebay.'" *Id.* ¶ 35.

13 "Lifeguard had bypassed Express to purchase directly from Prestan Products....
14 Lifeguard, represented by ... principal Harvard Reynolds, was first introduced to the Prestan
15 product line at Express' offices in Encinitas, California in May of 2008." *Id.* ¶ 36. "Lifeguard
16 circumvented the purchasing chain by ordering products directly through Prestan in
17 contravention of its agreement with Express. Lifeguard continues to purchase directly from
18 Prestan in circumvention of this agreement, and directly competes with Express selling these
19 products to the public, cutting Express out of its contractual share...." *Id.*

20 "Beginning about September, 2008, defendant Lifeguard has interfered with Express'
21 business relationships with (1) Philips, the company that manufacturers the AEDs for which
22 Lifeguard was Express' distributor, and (2) One Beat CPR, Express' current distributor of
23 Philips AEDs." *Id.* ¶ 38. "Prior to September, 2008, Express was in talks with Philips to
24 become a direct distributor of Philips products, rather than purchase the products through a
25 distributor." *Id.* ¶ 39. "On about September 9, 2008, Philips halted negotiations regarding
26 direct distributorship.... Lifeguard's princip[al]s had alerted Philips to the dispute between
27 Lifeguard and Express, causing Philips to back out of negotiations." *Id.*

28 "Since its dispute arose with Lifeguard, Express has been obtaining Philips AEDs

1 through distributor One Beat CPR. Between the months of about March and May of 2010,
 2 Express sold over \$50,000 worth of Philips AEDs, but have had to hold the orders because the
 3 AEDs were not available.” *Id.* ¶ 40. On June 8, 2010, “One Beat CPR informed Express in
 4 effect that Philips had instructed One Beat CPR not to ship any Philips products sold by
 5 Express.” *Id.* ¶ 42. “Philips’ decision was based on representations to Philips by Lifeguard
 6 and its principals and agents regarding the dispute, including requests that Philips refuse to
 7 ship products sold by Express. ... As a result, all the money and effort expended by Express
 8 in selling the AEDs has now culminated in over \$50,000 worth of orders Express cannot fill.”
 9 *Id.* ¶¶ 43-44.

10 The First Amended Complaint alleges 14 claims for relief: (1) copyright infringement;
 11 (2) intentional interference with economic advantage; (3) negligent interference with economic
 12 advantage; (4) intentional interference with contractual relations; (5) trespass to chattel; (6)
 13 conversion; (7) negligence; (8) “breach of contract [Distributor/Vendor Agreement]”; (9)
 14 breach of covenant of good faith and fair dealing; (10) “false promise [deceit]”; (11)
 15 intentional misrepresentation; (12) negligent misrepresentation; (13) unjust enrichment; and
 16 (14) violation of California Business and Professions Code §17200 *et seq.* *Id.* at 13-14.

17 B. Motion to Dismiss

18 On June 25, 2010, Defendant filed the Motion to Dismiss. (Doc. # 17). Defendant
 19 contends that “Plaintiff has failed to state facts upon which relief can be granted with regard
 20 to its claims for false promise, intentional misrepresentation, negligent misrepresentation, and
 21 unjust enrichment”; “Plaintiff has improperly plead[ed] recovery of punitive damages and
 22 attorneys’ fees”; and Plaintiff “improperly continues to reference individuals in its First
 23 Amended Complaint that are no longer defendants.” *Id.* at 1-2. Defendant moves for the
 24 dismissal of the claims for false promise, intentional misrepresentation, negligent
 25 misrepresentation and unjust enrichment pursuant to Federal Rule of Civil Procedure 12(b)(6).
 26 Defendant moves to strike the prayer for punitive damages and attorney’s fees and references
 27 to individuals in paragraphs 5-7 of the First Amended Complaint pursuant to Federal Rule of
 28 Civil Procedure 12(f).

1 On July 19, 2010, Plaintiff filed an opposition to the Motion to Dismiss. (Doc. # 19).
 2 Plaintiff contends that Plaintiff’s “claims sounding in misrepresentation are sufficiently pled,”
 3 and “Defendant *waived* the right to bring a motion to dismiss on unjust enrichment, as well as
 4 the motion to strike alleged ‘immaterial portions’ of Express’ First Amended Complaint”
 5 because Defendant failed to raise these issues in the previous Rule 12 motions. *Id.* at 1, 4.

6 On July 23, 2010, Defendant filed a reply in support of the Motion to Dismiss. (Doc.
 7 # 21).

8 **II. Discussion**

9 **A. Standard of Review**

10 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim
 11 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6)
 12 is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support
 13 a cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
 14 1990). When considering a motion to dismiss, a court must accept as true all “well-pleaded
 15 factual allegations.” *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1950 (2009). “[F]or a
 16 complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable
 17 inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to
 18 relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

19 **B. Intentional Misrepresentation, Negligent Misrepresentation and False
 20 Promise**

21 “The elements of fraud … are (a) misrepresentation (false representation, concealment,
 22 or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce
 23 reliance; (d) justifiable reliance; and (e) resulting damage.” *Small v. Fritz Cos., Inc.*, 30 Cal.
 24 4th 167, 173 (2003) (quotation omitted). “The tort of negligent misrepresentation” requires
 25 the same elements, except it “does not require scienter or intent to defraud.” *Id.* (citation
 26 omitted). “To maintain an action for deceit based on a false promise, one must specifically
 27 allege and prove, among other things, that the promisor did not intend to perform at the time
 28 he or she made the promise and that it was intended to deceive or induce the promisee to do
 or not do a particular thing.” *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153,

1 159 (1991) (citations omitted).

2 “It is well-established in the Ninth Circuit that both claims for fraud and negligent
 3 misrepresentation must meet Rule 9(b)’s particularity requirement.” *Neilson v. Union Bank*
 4 *of Cal.*, N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003); *see also Lorenz v. Sauer*, 807 F.2d
 5 1509, 1511-12 (9th Cir. 1987) (“Under California law, negligent misrepresentation is a species
 6 of actual fraud.”) (citation omitted). Rule 9(b) of the Federal Rules of Civil Procedure requires
 7 that, when fraud is alleged, “a party must state with particularity the circumstances constituting
 8 fraud....” Fed. R. Civ. P. 9(b). “Rule 9(b) demands that the circumstances constituting the
 9 alleged fraud be specific enough to give defendants notice of the particular misconduct so that
 10 they can defend against the charge and not just deny that they have done anything wrong.
 11 Averments of fraud must be accompanied by the who, what, when, where, and how of the
 12 misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)
 13 (quotations omitted). “To allege fraud with particularity, a plaintiff must set forth *more* than
 14 the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false
 15 or misleading about a statement, and why it is false. In other words, the plaintiff must set forth
 16 an explanation as to why the statement or omission complained of was false or misleading.”
 17 *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994), *superceded by statute of*
 18 *other grounds*. Under Rule 9(b), while fraud must be pled with specificity, “[m]alice, intent,
 19 knowledge, and other condition of mind of a person may be averred generally.” Fed. R. Civ.
 20 Proc. 9(b).

21 The First Amended Complaint alleges: “[D]efendants at the time of making
 22 representations of fact and failing to disclose material facts herein alleged knew them to be
 23 false or did not have a reasonable belief in their truth,” Doc. # 11 ¶ 110 (intentional
 24 misrepresentation); “Defendants breached their duty of care to plaintiff by making false
 25 representations of fact and failing to disclose material facts when they knew or should have
 26 known that the representations were not true,” *id.* ¶ 116 (negligent misrepresentation); and
 27 “Defendants made promises that they would enter into a Distribution/Vendor Agreement, and
 28 abide by its terms, including restrictions on advertising directly to Express clients, and

1 competing by contracting directly with Express vendors,” *id.* ¶ 100 (false promise).

2 These allegations, even viewed in conjunction with all other allegations in the First
 3 Amended Complaint, are not sufficient to satisfy the particularity requirement of Rule 9(b).
 4 The First Amended Complaint repeatedly references “representations” made by “Defendants”
 5 without identifying the content of the representations, when they were made, and who made
 6 them. The Motion to Dismiss is granted as to the claims for intentional misrepresentation,
 7 negligent misrepresentation and false promise.

8 C. Rule 12(g)

9 Plaintiff contends that, pursuant to Federal Rule of Civil Procedure 12(g), Defendant
 10 waived the right to bring the motion to dismiss the unjust enrichment claim, the motion to
 11 strike the prayers for punitive damages and attorney’s fees, and the motion to strike reference
 12 to individual defendants because Defendant failed to raise these issues in the previous motion
 13 to dismiss which addressed the original Complaint. Defendant contends that “Express’
 14 reliance on Rule (g)(2) is misplaced, as Lifeguard’s motion to dismiss is brought against
 15 Express’ first amended complaint not the original complaint, which has since been
 16 superceded.” (Doc. # 21 at 2).

17 Federal Rule of Civil Procedure 12(g) states that “[e]xcept as provided in Rule 12(h)(2)
 18 or (3), a party that makes a motion under this rule must not make another motion under this
 19 rule raising a defense or objection that was available to the party but omitted from its earlier
 20 motion.” Fed. R. Civ. P. 12(g)(2). Rule 12(h)(2) states that “[f]ailure to state a claim upon
 21 which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense
 22 to a claim may be raised” in a pleading, a motion for judgment on the pleadings or at trial.
 23 Fed. R. Civ. P. 12(h)(2). Rule 12(h)(3) relates to a court’s subject-matter jurisdiction. Courts
 24 have interpreted Rule 12(g) as allowing successive motions to dismiss for failure to state a
 25 claim, but not successive Rule 12(f) or 12(b)(2)-(5) motions. *See In re Parmalat Sec. Litig.*,
 26 497 F. Supp. 2d 526, 530 (S.D.N.Y. 2007); *Ong v. Sears, Roebuck & Co.*, 459 F. Supp. 2d 740
 27 n.10 (N.D. Ill. 2006). “Although an amended complaint ordinarily supercedes the original
 28 pleading, it does not automatically revive all of the defenses and objections that a defendant

1 has waived in response to the original complaint.” *Gilmore v. Shearson/Am. Exp. Inc.*, 811
 2 F.2d 108, 112 (2d Cir. 1987); *see also Fed. Agric. Mortg. Corp. v. It’s A Jungle Out There,*
 3 Inc., No. C03-3721, 2005 WL 3325051, at *5 (N.D. Cal., Dec. 7, 2005) (“The filing of an
 4 amended complaint will not revive the right to present by motion defenses that were available
 5 but were not asserted in timely fashion prior to the amendment of the pleading; conversely, a
 6 Rule 12 defense that becomes available because of new matter in the amended complaint may
 7 be asserted by motion.”) (quoting Wright & Miller, 5D Fed. Practice & Proc. § 1388, at 491-92
 8 (3d ed 2004)).

9 The Court concludes that pursuant to Rule 12(g)(2): Defendant may assert its Rule
 10 12(b)(6) motion related to the unjust enrichment claim, *see In re Parmalat Sec. Litig.*, 497 F.
 11 Supp. 2d at 530; Defendant may assert its Rule 12(f) motion related to the references to the
 12 individual defendants because it “bec[ame] available because of new matter in the amended
 13 complaint,” *see Fed. Agric. Mortg. Corp.*, 2005 WL 3325051, at *5; and Defendant has waived
 14 its right to bring the Rule 12(f) motions related to the requests for punitive damages and
 15 attorney’s fees, *see id.*

16 **D. Unjust Enrichment**

17 “The state and the federal courts appear to be unclear whether in California a court may
 18 recognize a claim for ‘unjust enrichment’ as a separate cause of action.” *Nordberg v.*
 19 *Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006) (collecting cases); *see also MB*
 20 *Tech., Inc. v. Oracle Corp.*, No. C09-5988, 2010 WL 1576686, at *4 (N.D. Cal., 2010)
 21 (“California courts, as well as the courts in this District, are squarely divided on this point [of
 22 whether unjust enrichment is a cause of action].”) (collecting cases).

23 This Court concludes unjust enrichment is not a separate claim under California law.
 24 *See MB Tech., Inc.*, 2010 WL 1576686, at *4 (“Of these conflicting interpretations, the better
 25 view is that unjust enrichment represents a form of relief rather than an independent claim.”);
 26 *Johns v. Bayer Corp.*, No. 09cv1935-DMS, 2010 WL 476688, at *6 n.3 (S.D. Cal., Feb. 9,
 27 2010) (“While a split of authority appears to exist on this issue, this Court agrees with those
 28 courts that conclude unjust enrichment is not a separate claim.”); *McBride v. Boughton*, 123

1 Cal. App. 4th 379, 387 (2004) (“Unjust enrichment is not a cause of action ... or even a
 2 remedy, but rather a general principle, underlying various legal doctrines and remedies. It is
 3 synonymous with restitution.”) (citing *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th
 4 779, 793 (2003)); *see also McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006)
 5 (“There is no cause of action for unjust enrichment. Rather, unjust enrichment is a basis for
 6 obtaining restitution based on quasi-contract or imposition of a constructive trust.”) (citation
 7 omitted). “To plead ... unjust enrichment, a plaintiff must allege a receipt of a benefit and
 8 unjust retention of it at the expense of another. A dismissal of the [unjust enrichment] ‘claim’
 9 will not, in fact, preclude [plaintiff]’s ability to recover on a theory of unjust enrichment,
 10 because [plaintiff] could potentially show the existence of these elements in connection with
 11 several of its other claims, such as copyright infringement or fraud.” *MB Tech., Inc.*, 2010 WL
 12 1576686, at *4 (citing *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000)).

13 The Motion to Dismiss the unjust enrichment claim is granted. This ruling will not
 14 preclude Plaintiff from seeking to recovery on a theory of unjust enrichment in connection with
 15 Plaintiff’s other claims. *See id.; see also* First Am. Compl. at 18, Doc. # 11 (in prayer for
 16 relief, Plaintiff seeks “restitution [of] any profits or damages attributable to defendants’ unfair
 17 competition, infringement of copyright, interference with business relations prospective and
 18 existing, and other wrongful conduct”); *cf. McBride*, 123 Cal. App. 4th at 387 (“Unjust
 19 enrichment is ... synonymous with restitution.”).

20 **E. Motion to Strike References to Individual Defendants**

21 Defendant contends:

22 In its original complaint, Express brought causes of action against Lifeguard’s
 23 employee Shirley Cantrell, and two of Lifeguard’s officers Chet Frist and
 24 Harvard Reynolds (the ‘Individual Defendants’). ... Express’ [First Amended
 25 Complaint] continues to reference ‘defendants’ (plural) even though there is
 26 only one named defendant. Additionally, the general averments of the [First
 27 Amended Complaint] confusingly continue to reference the Individual
 28 Defendants, as if they were parties. Lifeguard requests that reference to the
 Individual Defendants in paragraphs 5, 6 and 7 be stricken from the [First
 Amended Complaint].

(Doc. # 17-1 at 10). Defendant moves to strike reference to the individuals pursuant to Federal
 Rule of Civil Procedure 12(f).

1 Paragraphs 5-7 of the First Amended Complaint, which appear in a section entitled,
 2 “Jurisdiction and Venue,” allege:

3 5. Each defendant named above is a natural person doing business under
 4 fictitious business names, except Lifeguard Medical Solutions, LLC, dba
 5 Lifeguardmed.com, Aedsupplystore.com, which is believed to be a Limited
 Liability Company organized under the laws of the State of Tennessee and doing
 business there and elsewhere, including the State of California.

6 6. Plaintiff is informed and believes that Harvard Reynolds, Chet Frist are
 7 members, managers and/or principals of Lifeguard Medical Solutions, LLC.

8 7. Plaintiff is informed and believes that Harvard Reynolds, Chet Frist,
 Shirley Cantrell, and Lifeguard Medical Solutions, LLC., dba
 9 Lifeguardmed.com, Aedsupplystore.com (collectively “Lifeguard”), are doing
 business at the website domains lifeguardmed.com and aedsupplystore.com.

10 (Doc. # 11 ¶¶ 5-7).

11 Pursuant to Rule 12(f), a party may move a court to “order stricken from any pleading
 12 ... any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The
 13 function of a 12(f) motion to strike is to avoid the expenditure of time and money that must
 14 arise from litigating spurious issues by dispensing with those issues prior to trial.” *Fantasy,*
 15 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, *Fogerty v.*
 16 *Fantasy, Inc.*, 510 U.S. 517 (1994). “Motions to strike are generally regarded with disfavor
 17 because of the limited importance of pleading in federal practice....” *Neilson v. Union Bank*
 18 *of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003) (citations omitted). “[M]otions [to
 19 strike] should be denied unless the matter has no logical connection to the controversy at issue
 20 and may prejudice one or more of the parties to the suit.” *In re UTStarcom, Inc. Sec. Litig.*,
 21 617 F. Supp. 2d 964, 969 (N.D. Cal. 2009) (citations omitted). “When considering a motion
 22 to strike, the court must view the pleading in a light most favorable to the pleading party.” *Id.*
 23 (quotation omitted). Whether to grant a motion to strike lies within the discretion of the
 24 district court. *See Fantasy, Inc.*, 984 F.2d at 1528.

25 Although paragraph 5 begins, “[e]ach defendant named above,” it is clear from the
 26 caption of the First Amended Complaint that Lifeguard is the only remaining Defendant in this
 27 action. Both Plaintiff and Defendant have filed documents evidencing an understanding that,
 28 upon the filing of the First Amended Complaint, there was only one Defendant in this action.

1 See Pl.’s Notice of Filing First Am. Compl. at 2, Doc. # 14 (“Express removed the individual
2 defendants from the First Amended Complaint....”); Def.’s Mem. Supp. Mot. Dismiss at 10,
3 Doc. # 17-1 (“Express’ [First Amended Complaint] continues to reference ‘defendants’ (plural)
4 even though there is only one named defendant.”). Viewing the allegations in the First
5 Amended Complaint in the light most favorable to Plaintiff, the Court does not find that
6 references to individuals in paragraphs 5, 6 and/or 7 of the First Amended Complaint will
7 result in “litigating spurious issues,” *Fantasy, Inc.*, 984 F.2d at 1527, or “may prejudice”
8 Defendant, *In re UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d at 969. The motion to strike
9 references to individuals in paragraphs 5, 6 and 7 is denied.

10 **III. Conclusion**

11 IT IS HEREBY ORDERED that the “Rule 12(b)(6) Motion to Dismiss and Rule 12(f)
12 Motion to Strike Plaintiff’s [First Amended] Complaint” is GRANTED IN PART and
13 DENIED IN PART. (Doc. # 17). The motion is granted as to the claims for intentional
14 misrepresentation, negligent misrepresentation, false promise and unjust enrichment. The
15 motion is denied in all other respects. The claims for intentional misrepresentation, negligent
16 misrepresentation, false promise and unjust enrichment are DISMISSED without prejudice.

17 DATED: September 1, 2010

18 
19 **WILLIAM Q. HAYES**
United States District Judge

20

21

22

23

24

25

26

27

28